Supreme Court, U. S.
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MICHAEL RODAK, JR., CLERK

APPENDIX

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York,

VINCENT GAZZETTA, as Director of the Division of Teacher Education and Certification of the Education Department of the State of New York, and

ROBERT ASHER, as Director of the Division of Professional Conduct of the Education Department of the State of New York,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

Jurisdictional Statement Filed December 11, 1976
Probable Jurisdiction Noted May 15, 1978

IN THE

Supreme Court of the United States

OCTOBER TERM, 1976

No. 76-808

GORDON M. AMBACH, as Commissioner of Education of the State of New York, et al.,

Appellants,

against

SUSAN M. W. NORWICK,

Appellee,

TARJA U. K. DACHINGER,

Intervenor Appellee.

APPENDIX—ERRATA

Page 7, paragraph 13, line 2—
delete "Eduaction" and insert "Education" in place thereof.

Page 34, second paragraph, line 6—
delete "Nores" and insert ~~"inores"~~ in place thereof.

Page 35, second paragraph, line 4—
delete "liimted" and insert "limited" in place thereof.

Page 36, third paragraph, line 8—
delete first "or" and insert "of" in place thereof.

Page 49, note 1, line 3—
insert "hyphen" after "Enter."

Page 51, note 6 (continued), line 3—
delete "3001a-" and insert "3001-a" in place thereof.

Page 53, note 14, line 5—
delete "scheme" and insert "schema" in place thereof.

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Relevant Docket Entries

DATE	PROCEEDINGS
Jun. 27–74	Filed Complaint. Issued Summons.
Jun. 27–74	Filed Affidavit of Michael P. Asen.
Jul. 29–74	Filed summons and return—served the following: Ewald Nyquist by Dr. Fred Goldenberg on 7-10-74 Vincent Gazzetta by Dr. Fred Goldenberg on 7-10-74 Thomas Milana by Dr. Fred Goldenberg on 7-10-74
Aug. 14–74	Filed temporary restraining order on consent—ordered that defts. promptly process pltff's application for provisional teachers certification and refrain from denying said application solely on the ground of pltff's alien status—that this temporary restraining order remain in effect, without the posting of security by pltff, etc. and that the service of a copy of this order upon the office of the Attorney General, etc. on or before 8-15-74 shall be deemed sufficient service hereof. OWEN, J. (m/n)
• • •	
June 13–75	Filed ANSWER of defts. to the complaints.
June 17–75	Filed stip & order that the temporary restraining order now in effect continue until further order of the Court. So ordered—CONNER, J.
Aug. 19–75	Filed pltff's affdvt. and notice of motion for an order to convene a three Judge court.
Aug. 19–75	Filed pltff's memorandum in support of motion to convene a three Judge court.

DATE	PROCEEDINGS
Aug. 19–75	Filed notice of motion for leave to intervene.
Sept. 5–75	Filed Memo Endorsed on Notice of Motion filed 08-19-75 . . . Granted on consent of counsel for defendants. So ORDERED. CONNER, J. (m/n)
Sept. 09–75	Filed Memorandum Decision and Order—Opinion No. 43042 . . . This is an action challenging the constitutionality of Sections 3001 & 3001-a of N.Y. Education Law etc. . . . and for reasons stated Plaintiffs' motion to convene a three-judge court is granted. So ORDERED. CONNER, J. (m/n)
Dec. 24–75	Filed Order—that pltffs' application is set for a hearing on 02-11-76—that pltffs' memoranda and affdvt in support of their application shall be filed on or before 01-09-76. Deft's memoranda and affdvts. in opposition shall be filed on or before 01-19-76. Reply papers should be filed within one week after the filing of defts' answering papers. CONNER, J. (m/n)
Jan. 12–76	Filed pltffs' notice of motion for an order for summary judgment. Ret. 2-11-76.
Jan. 12–76	Filed pltffs' memorandum of law in support of their motion for summary judgment.
Jan. 19–76	Filed defts' memorandum of law in support of constitutionality of New York Education Law Sec. 3001(3) and 3001-a and 8 New York Codes, Rules and Regulations sec. 80.2 (i).
04–26–76	Filed defts' affdvt. of Judith A. Gordon submitted at request of CONNER, J. and constitutes an offer of proof with respect to the witnesses described as indicated.

DATE	PROCEEDINGS
05–06–76	Filed transcript of record of proceedings, dated 2-11-76.
07–20–76	Filed Opinion #44808—for the reasons stated, we conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined. Pltffs' motion for summary judgment is granted. Submit order on notice. FEINBERG, C.J., CONNER, D.J. and PIERCE, D.J. (m/n)
08–24–76	Filed Order and Judgment that Sec. 3001(3) of the N.Y. Education Law is declared unconstitutional that defts Ewald Nyquist, Vincent Gazzetta & Thomas Milana are permanently enjoined and restrained from enforcing Sec. 3001(3) and are ordered to pay to pltffs their reasonable costs to be taxed expended in this action. CONNER, J. JUDGMENT ENTERED: 8-25-76.
10–13–76	Filed defts. and their successors in office notice of appeal . . . from the Order and Judgment of the three-judge District Court entered on 8-25-76. Copy to: Bruce J. Ennis, N.Y. Civil Liberties Union. Ent. 10-13-76.
11–19–76	Filed pltff's notice of entry of order & judgment on 8-24-76.
7–21–78	Filed stip and order amending caption. CONNER, J.

• • •

Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798 (W.C.C.)

VERIFIED COMPLAINT

Three-Judge Court

SUSAN M. W. NORWICK,

Plaintiff,

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Defendants.

JURISDICTION

1. Plaintiff brings this suit pursuant to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 1343(3) and (4) 8 U.S.C. §§ 1101 through 1503, the 14th Amendment to the United States Constitution and Article VI of the United States Constitution. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* Plaintiff also seeks an injunction by

a three judge federal court enjoining the enforcement of state statutes and regulations on the ground that they are unconstitutional, pursuant to 28 U.S.C. 2281 and 2284.

PARTIES

2. Plaintiff Susan M. W. Norwick is a federally registered permanent alien, and maintains a permanent residence at 210 West 89th Street, New York, New York 10024. Plaintiff was born in Dundee, Scotland, and is a citizen of Great Britain. Plaintiff is a graduate, Summa Cum Laude, of North Adams State College, North Adams, Massachusetts, where she received a B.A. degree, and is presently a full-time graduate student working towards an M.S. degree in Developmental Reading at the State University of New York at Albany. Plaintiff has completed 21 credits towards her M.S. degree, with a 4.0 (out of 4.0) grade average, and will complete her M.S. requirements this fall. Plaintiff has been employed (a) from 1967-1972 as a teacher at the Riverside Elementary School, a private school in New York City; (b) from 1965-1967 as an editor of The Reading Laboratory, Lexington Avenue, New York City; (c) from 1961-1965 as a teacher at The Mount School, London, England; and (d) from 1960-1961 as a teacher in primary schools in Edinburgh, Scotland. Plaintiff has been married to a United States citizen, Kenneth P. Norwick, since 1966.

3. Defendant Thomas Milana is sued individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education, 261 Madison Avenue, New York, New York.

4. Defendant Ewald Nyquist is sued individually and as Commissioner of the New York State Department of Edu-

cation. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

5. Defendant Vincent Gazzetta is sued individually and as Director of the Division of Teacher Certification, New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

6. At all times relevant herein, defendants have acted, or failed to act, under color of New York State statutes and regulations.

ALLEGATIONS

7. Plaintiff is not subject to conscription by Great Britain, or deportation by the United States.

8. Plaintiff has resided in the United States continuously since 1965.

9. Plaintiff has no plans to leave New York or return to Great Britain.

10. For several years plaintiff has paid income taxes to the City of New York, New York State, and the federal government, and pays real estate taxes on property owned in a tenancy by the entirety with Kenneth P. Norwick in Stockbridge, Massachusetts.

11. Plaintiff is willing to subscribe to an oath to support the Constitution of the State of New York and the United States Constitution, if so required.

12. On November 26, 1973, plaintiff filed with defendants an application for a provisional teacher certificate.

13. By letter dated March 19, 1974, plaintiff received notice from James Rowney, Eduaction Aide to the defendants, and subject to their control, that she met the academic requirements for provisional certification but that Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education require that an applicant for provisional teacher certification be a citizen of the United States, or have filed a Declaration of Intention of United States Citizenship.

14. Plaintiff is required by § 3001 of the Education Law of the State of New York to have a certificate, or a provisional certificate, in order to teach in public schools in New York State. Upon information and belief, plaintiff is required to have either a certificate, or a provisional certificate, in order to teach in most accredited private schools in New York State.

15. Plaintiff is seeking employment to begin this fall as a teacher in a public school, or an accredited private school, in New York State.

16. Plaintiff is in all respects qualified for such employment but will be denied such employment solely because she does not possess a certificate of provisional certification.

17. Plaintiff is in all respects qualified to receive a certificate of provisional certification except for the requirement imposed by Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York, that she be a citizen of the United States, or that she file a Declaration of Intention to become a citizen of the United States.

18. Plaintiff has been denied a certificate of provisional certification solely because of her status as an alien. That denial violates plaintiff's constitutional rights under the equal protection clause of the 14th Amendment to the United States Constitution in that, among other grounds, there is no rational basis for treating plaintiff, a federally registered permanent alien, differently from United States citizens, and no compelling state interest in denying her a certificate of provisional certification solely because of her status as an alien.

19. Defendants have failed and refused to make an individualized determination of plaintiff's competence and ability as a teacher, or of her suitability to receive a certificate of provisional certification. That failure and refusal constitutes a violation of plaintiff's constitutional rights under the Due Process Clause of the 14th Amendment to the United States Constitution.

20. The requirement of sections 3001 and 3001-a of the New York State Education Law, and Section 80.2 of the Regulations of the Commissioner of Education, is in conflict with, and frustrates the implementation of, 8 U.S.C. §§ 1101 through 1503, and is therefore unconstitutional under the Supremacy Clause, Article VI, of the United States Constitution.

WHEREFORE, plaintiff demands judgment:

1. Convening a three-judge federal court pursuant to 28 U.S.C. Sections 2281 and 2284;

2. Declaring Sections 3001 and 3001-a of the New York State Education Law, and Section 80.2 of the Regulations of the Commissioner of Education, to be unconstitutional;

3. Granting a preliminary and permanent injunction restraining defendants from enforcing said sections and requiring defendants to issue a certificate of provisional certification to plaintiff; and

4. Granting plaintiff the costs of this action and such further relief as to the Court seems just and proper.

Dated: New York, New York
June 21, 1974

/s/ BRUCE J. ENNIS
BRUCE J. ENNIS
Attorney for Plaintiff

(Verified by Susan M. W. Norwick on June 21, 1974.)

Affidavit of Bruce J. Ennis in Support of Temporary Restraining Order

STATE OF NEW YORK
COUNTY OF NEW YORK } ss.:

Bruce J. Ennis, being duly sworn, deposes and says:

1. I am counsel for the plaintiff. This affidavit is submitted pursuant to FRCP 65(b) in support of the attached Temporary Restraining Order.

2. Attached hereto is a copy of the verified complaint, which was served on or about July 10th 1974.

3. Plaintiff Susan M. W. Norwick is seeking employment this fall as a teacher in the New York City School System. In order to gain employment she needs provisional teachers certification.

4. Plaintiff has been denied provisional certification on the grounds that she is a citizen of Great Britain and not of the United States.

5. I have personally discussed this matter with Judith Gordon, Assistant Attorney General and counsel for the defendants, and she has authorized me to state that defendants will consent to the issuance of a Temporary Restraining Order, in the form attached hereto, and will further consent to an extension of the Temporary Restraining Order until this case can be heard on the merits, or until further order of the court.

(Sworn to by Bruce J. Ennis on August 9, 1974.)

Temporary Restraining Order

Based upon the annexed affidavit of Bruce J. Ennis, sworn to August 9, 1974, the verified complaint, and the consent of the attorney for the defendants, Judith Gordon, and pursuant to FRCP 65(b) it is:

1. Ordered, that defendants promptly process plaintiff's application for provisional teachers certification and refrain from denying said application solely on the ground of plaintiff's alien status; and it is further

2. Ordered, that this Temporary Restraining Order remain in effect, without the posting of security by plaintiff, until the action can be heard on the merits, or until further order of this court; and it is further

3. Ordered, that the service of a copy of this order upon the office of the Attorney General, attorney for the defendants, at 2 World Trade Center, New York, New York, on or before August 15, 1974 shall be deemed sufficient service hereof.

/s/ RICHARD OWEN
U.S. District Judge

Dated: New York, New York
August 14, 1974

Issued at 10:35 A.M.

consented to:

Honorable Louis J. Lefkowitz

/s/ JUDITH GORDON
Judith Gordon, Ass't Attorney General

Answer

Defendants, answering the Complaint herein by their attorney Louis J. Lefkowitz, Attorney General of the State of New York, respectfully allege:

FIRST: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraph "2".

SECOND: Deny so much of paragraphs "3", "4" and "5" as alleges or implies that defendants or any of them are amenable to suit in their individual capacities for the acts complained of herein.

THIRD: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegation in paragraph "7" that plaintiff is not subject to conscription by Great Britain and deny the allegation in paragraph "7" that plaintiff is not subject to deportation by the United States.

FOURTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "8", "9", "10" and "11".

FIFTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "12", "13", "14" and "17" except insofar as the statutes, regulations and documents cited therein provide.

SIXTH: Defendants lack knowledge or information sufficient to form a belief as to the truth of the allegations in paragraphs "15" and "16".

SEVENTH: Deny each and every allegation in paragraphs "18" and "19" except defendants admit that they have not

made an individual determination of plaintiff's competence to teach different from that required under existing law.

EIGHTH: Deny each and every allegation in paragraph "20".

FURTHER ANSWERING THE COMPLAINT AND AS AND FOR A FIRST COMPLETE DEFENSE:

NINTH: The Court lacks jurisdiction over the subject matter of this action.

AS AND FOR A SECOND COMPLETE DEFENSE:

TENTH: The Complaint fails to state a claim for the relief demanded.

AS AND FOR A THIRD DEFENSE:

ELEVENTH: The complaint fails to state a claim against the defendants in their individual capacities, said defendants having acted at all times relevant herein pursuant to and within the scope of their public duties and responsibilities under state statutes and regulations deemed constitutional at the time of the acts challenged.

AS AND FOR A FOURTH DEFENSE:

TWELFTH: The defendants are immune from suit and/or from judgments against them in their individual capacities, said defendants having at all times relevant herein acted in good faith pursuant to and within the scope of their public duties and responsibilities under state statutes and regulations deemed constitutional at the time of the acts challenged.

AS AND FOR A FIFTH DEFENSE:

THIRTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are valid under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A SIXTH DEFENSE:

FOURTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are valid under the Due Process Clause of the Fourteenth Amendment to the United States Constitution.

AS AND FOR A SEVENTH DEFENSE:

FIFTEENTH: New York State Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 are consistent with 8 U.S.C. § 1101 *et seq.* and valid under the Supremacy Clause, Article VI, of the United States Constitution.

AS AND FOR AN EIGHTH DEFENSE:

SIXTEENTH: The Eleventh Amendment bars the award of costs and/or fees against the State of New York, any department, agency or bureau thereof and any officer or employee of said State, department, agency or bureau in his or her official capacity.

AS AND FOR A NINTH DEFENSE:

SEVENTEENTH: No statute authorizes the award of fees against the State of New York, any department, agency

or bureau thereof and any officer or employee of said State, department, agency or bureau in the within action.

WHEREFORE, defendants pray for judgment dismissing the Complaint or, in the alternative, declaring New York Education Law §§ 3001, 3001-a and 8 New York Code, Rules and Regulations § 80.2 valid under the Supremacy Clause and Fourteenth Amendment of the United States Constitution and for such different relief as the Court may find just and proper in the premises.

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York
Attorney for Defendants
By
/s/ JUDITH A. GORDON
JUDITH A. GORDON
Assistant Attorney General

(Verified by Judith A. Gordon on June 2, 1975.)

Intervenor's Complaint

UNITED STATES DISTRICT COURT

SOUTHERN DISTRICT OF NEW YORK

74 Civ. 2798

VERIFIED COMPLAINT

Three-Judge Court

SUSAN M. W. NORWICK,

Plaintiff,

TARJA U. K. DACHINGER,

Intervenor Plaintiff, —

—against—

EWALD NYQUIST, individually and as Commissioner of the New York State Department of Education,

VINCENT GAZZETTA, individually and as Director of the Division of Teacher Certification, New York State Department of Education, and

THOMAS MILANA, individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education,

Defendants.

JURISDICTION

1. Plaintiff brings this suit pursuant to 42 U.S.C. §§ 1981 and 1983, 28 U.S.C. §§ 1343(3) and (4), 8 U.S.C. §§ 1101 through 1503, the 14th Amendment to the United States

Constitution and Article VI of the United States Constitution. Plaintiff seeks a declaratory judgment pursuant to 28 U.S.C. §§ 2201 *et seq.* Plaintiff also seeks an injunction by a three judge federal court enjoining the enforcement of state statutes and regulations on the ground that they are unconstitutional, pursuant to 28 U.S.C. 2281 and 2284.

PARTIES

2. Plaintiff Tarja U. K. Dachinger is a federally registered permanent alien, and maintains a permanent residence at 120-19 Coop City Boulevard, Bronx, New York 10475. Plaintiff was born in Turku, Finland, and is a citizen of Finland. Plaintiff is a graduate, Cum Laude, of Lehman (City) College, Bronx, New York, where she received a B.A. degree, major subject German, and an M.S. degree in Early Childhood also at Lehman College of the City University of N.Y.C. Plaintiff has been employed from October 1966-June 1967 and September-December 1970 at the Victory Day Care Center, Bronx, New York, as an assistant teacher and group teacher respectively. Cessation of teaching was due to the rearing of two children, the first of whom was born May 25, 1971. Plaintiff has been married to a United States citizen, Eric S. Dachinger, since 1966.

3. Defendant Thomas Milana is sued individually and as Acting Director of the Division of Professional Conduct, New York State Department of Education, 261 Madison Avenue, New York, New York.

4. Defendant Ewald Nyquist is sued individually and as Commissioner of the New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

5. Defendant Vincent Gazzetta is sued individually and as Director of the Division of Teacher Certification, New York State Department of Education. Upon information and belief he maintains an office at 261 Madison Avenue, New York, New York.

6. At all times relevant herein, defendants have acted, or failed to act, under color of New York State statutes and regulations.

ALLEGATIONS

7. Plaintiff is not subject to conscription by Finland, or deportation by the United States.

8. Plaintiff has resided in the United States continuously since 1966, except for Summer visits to Finland.

9. Plaintiff has no plans to leave New York or return to Finland, except for Summer vacations to see family.

10. For several years plaintiff has paid income taxes to the City of New York, New York State, and the federal government, and pays real estate taxes on property owned in a coop apartment by the entirety with Eric S. Dachinger in the Bronx, New York (Coop City).

11. Plaintiff is willing to subscribe to an oath to support the Constitution of the State of New York and the United States Constitution, if so required.

12. In September 1970 plaintiff received a provisional teacher certificate.

13. In April 1975 plaintiff filed with defendants an application for permanent certification.

14. By letter dated April 23, 1975, plaintiff received notice from James Rowney, Education Aide to the defendants, and subject to their control, that she met the academic requirements for permanent certification but "that New York State education law also requires U.S. citizenship for permanent certification."

15. Plaintiff is required by § 3001 of the Education Law of the State of New York to have a certificate or a provisional certificate, in order to teach in public schools in New York State. Upon information and belief, plaintiff is required to have either a certificate, or a provisional certificate, in order to teach in most accredited private schools in New York State.

16. Plaintiff is seeking employment to begin this Fall as teacher in a public school, or an accredited private school, in New York State.

17. Plaintiff is in all respects qualified for such employment but will be denied such employment solely because she will not possess a certificate of provisional certification, which expires September 30, 1975, or permanent certification.

18. Plaintiff is in all respects qualified to receive a certificate of permanent certification except for the requirement imposed by §§ 3001 and 3001-a of the New York Education Law & § 80.2 of the Regulations of the Commissioner of Education of the State of New York, that she be a citizen of the United States, or that she file a Declaration of Intention to become a citizen of the United States.

19. Plaintiff has been denied a certificate of permanent certification solely because of her status as an alien. That

denial violates plaintiff's constitutional rights under the equal protection clause of the 14th Amendment to the United States Constitution in that, among other grounds, there is no rational basis for treating plaintiff, a federally registered permanent alien, differently from United States citizens, and no compelling state interest in denying her permanent certification solely because of her status as an alien.

20. Defendants have failed and refused to make an individualized determination of plaintiff's competence and ability as a teacher or of her suitability to receive a permanent certification. That failure and refusal constitutes a violation of plaintiff's constitutional rights under the Due Process Clause of the 14th Amendment to the United States Constitution.

21. The requirement of §§ 3001 and 3001-a of the New York State Education Law, and § 80.2 of the Regulations of the Commissioner of Education, is in conflict with, and frustrates the implemention of, 8 U.S.C. §§ 1101 through 1503, and is therefore unconstitutional under the Supremacy Clause, Article VI, of the United States Constitution.

WHEREFORE, plaintiff demands judgment:

1. Convening a three-judge federal court pursuant to 28 U.S.C. §§ 2281 and 2284;

2. Declaring §§ 3001 and 3001-a of the New York State Education Law, and §§ 80.2 of the Regulations of the Commissioner of Education, to be unconstitutional;

3. Granting a preliminary and permanent injunction requiring defendants to issue a permanent certificate to plaintiff; and

4. Granting plaintiff the costs of this action and such further relief as to the Court seems just and proper.

Dated: New York, New York
Aug. 26, 1975

/s/ BRUCE J. ENNIS
Bruce J. Ennis
Attorney for Intervenor Plaintiff

(Verified by Tarja U. K. Dachinger on August 26, 1975)

Memorandum and Order Convening Three-Judge Court

CONNER, D. J.:

This is an action challenging the constitutionality of Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York insofar as they are applied to deny plaintiffs, permanent resident aliens, the right to be certified to teach in the public schools solely because of their lack of United States citizenship. Presently under consideration is a motion pursuant to 28 U.S.C. §§ 2181 and 2184 for an order convening a three-judge court to consider plaintiffs' application for an injunction restraining the enforcement of the challenged statutes and regulation. Although not conceding the merit of plaintiffs' claims, defendants have consented to the convening of a three-judge court.

Since the challenged statutes and regulation are of statewide application, state officers are parties defendant, injunctive relief is sought, and it is claimed that the challenged statutes and regulation are violative of the Constitution of the United States, unless the complaint is frivolous, a three-judge court is mandated by 28 U.S.C. §§ 2281 and 2284. Sections 3001 and 3001-a of the Education Law and Regulation 80.2(i) on their face discriminate against certain classes of persons on the basis of alienage. Classifications based on alienage, like those based on nationality and race, are inherently suspect and subject to close judicial scrutiny. *Graham* v. *Richardson*, 403 U.S. 365, 372 (1970); see *In re Griffiths*, 413 U.S. 717, 721 (1973); *Sugarman* v. *Dougall*, 413 U.S. 634, 641-43 (1973). Clearly, this case is not frivolous.

Memorandum and Order

Plaintiffs' motion to convene a three-judge court is granted.

So ORDERED.

/s/ WILLIAM C. CONNER
United States District Judge

Dated: New York, New York
September 9, 1975

Notice of Motion for Summary Judgment

SIRS:

PLEASE TAKE NOTICE THAT, upon the verified complaints, the answer, and Plaintiffs' Statement Pursuant to Rule 9(g) of the Rules of this Court annexed hereto, and pursuant to Rule 56, Fed. R. Civ. Pro., Plaintiffs will move this Court February 11, 1976, at 3:00 p.m., or as soon thereafter as counsel may be heard, in room 318, United States Court House, Foley Square, New York, New York, for summary judgment granting them the relief demanded in their complaints.

Yours, etc.

/s/ BRUCE J. ENNIS
BRUCE J. ENNIS
Attorney for Plaintiffs

To: Hon. Louis J. Lefkowitz
Att.: Judith Gordon, Esq.
Attorney for Defendants

DATED: New York, New York
January 6, 1976

Statement under Rule 9(g) of the General Rules of the United States District Courts for the Southern and Eastern Districts of New York

Plaintiffs believe there is no genuine dispute with respect to the material facts. Those facts are:

1. Plaintiff Susan M. W. Norwick is a federally registered permanent alien. She is a citizen of Great Britain. She is married to a United States citizen, Kenneth P. Norwick.

2. Intervenor Plaintiff Tarja U. K. Dachinger is a federally registered permanent alien. She is a citizen of Finland. She is married to a United States citizen, Eric S. Dachinger.

3. Defendant Ewald Nyquist is the Commissioner of the New York State Department of Education. Defendant Vincent Gazzetta is the Director of the Division of Teacher Certification, New York State Department of Education. Defendant Thomas Milana is the Acting Director of the Division of Professional Conduct, New York State Department of Education.

4. Except for vacation, plaintiffs Norwick and Dachinger have resided in the United States continuously since 1965 and 1966, respectively.

5. For several years, plaintiffs have paid income taxes to New York City, New York State, and the federal government, and real estate taxes on property owned with their husbands.

6. Plaintiffs are willing to subscribe to an oath to support the Constitution of the State of New York, and the Constitution of the United States, if so required.

Rule 9(g) Statement

7. Plaintiffs are required by § 3001 of the Education Law of the State of New York to have a certificate, or a provisional certificate, in order to teach in public schools in New York State.

8. Except for alienage, plaintiff Norwick is in all respects qualified to receive a certificate, or a provisional certificate. Except for alienage, plaintiff Dachinger is in all respects qualified to receive a certificate. She possesses a provisional certificate, which will expire September 30, 1975.

9. Plaintiff Norwick has applied for, and been denied, a provisional certificate, and plaintiff Dachinger has applied for, and been denied, a certificate. Both denials were issued by defendants, or by persons under their supervision and control, under the color and authority of §§ 3001 and 3001-a of the New York State Education Law, and § 80.2 of the Regulations of the Commissioner of Education of the State of New York (8 NYCRR § 80.2).

/s/ Bruce J. Ennis
Bruce J. Ennis

Dated: New York, New York
January 6, 1976

Letter from Michael B. Rosen to Bruce Ennis

February 6, 1976

Bruce Ennis, Esq.
New York Civil Liberties Union
84 Fifth Avenue
New York, N.Y. 10011

Dear Bruce:

At the request of Kenneth Norwick, I am enclosing a copy of the Circular that was issued by the Chancellor last Spring governing the May, 1975, elections for community school boards in the City School District of the City of New York pursuant to Article 52-a of the Education Law.

As you are aware, the elections are conducted by the New York City Board of Elections. Both the Board of Education and the Board of Elections have interpreted the applicable statute (Educ. Law Section 2590-c) to provide for voting by both registered voters and by parent voters who meet the requirements of the statute, notwithstanding that they are not United States Citizens. The community school board elections which have been held to date have extended the franchise to parent voters regardless of citizenship. To the best of my knowledge, there has been no litigation challenging the eligibility of parent voters to vote in community school board elections.

Our understanding of the legislative history of this provision is that it was the intent of the legislature to extend to parents of children in the New York City public schools the right to vote for the community school boards which would govern the affairs of the schools in which their children were enrolled. The legislature took into account the fact that in New York City there are large numbers of parents who are not registered voters or who are not United States citizens who are interested in and

concerned about the governance of the schools to which they send their children, e.g., to cite two major groups, there are large numbers of parents of Chinese and Dominican origin who are neither citizens nor registered voters.

I trust that this information is responsive to your inquiry.

Very truly yours,

/s/ MICHAEL B. ROSEN
Michael B. Rosen
Counsel to the Chancellor

Special Circular No. 57 (1974-1975) (Excerpts)

ELIGIBILITY TO VOTE

In order to vote in the Community School Board elections a person must be either (a) a registered voter qualified under the elections law, or (b) a parent—or a person acting in the role of a parent—of a child attending a public elementary, intermediate or junior high school who is at least 18 years of age and a city resident for at least 30 days prior to May 6 and who has registered to vote in this election.

A "parent voter" (see *b* above) does not need to be a U.S. Citizen.

Parents of public elementary, intermediate or junior high school children who are registered voters qualified under the elections law may vote either in the district in which they reside or in one community school district in which their children attend school if they register as "parent voters" in that district.

"Parent voters" (those whose children attend a public elementary, intermediate or junior high school and who do not qualify as registered voters under the elections law) may vote only in one community school district in which their children attend school.

Parents of children attending an academic high school, vocational high school or Special School under the jurisdiction of the central Board of Education may qualify only as permanently registered voters under the elections law and may vote as such in the school district of their residence—unless they have children also in a public elementary, intermediate or junior high school in which case they may vote either in the district in which they reside or in the district in which their elementary or junior high school children attend school if they register as "parent voters" in that district.

Permanently registered voters who are not parents as defined above will vote in the community school district in which they reside.

No person may vote more than once. No person may vote in more than one community school district.

Registration—March 19, 21, 22, 1975

Registration of permanent and parent voters will be held in all public elementary schools on four days beginning on Wednesday March 19. From Wednesday through Friday (March 19, 20, 21) registration will be conducted from 12 noon to 8:30 P.M. On Saturday, March 22, the hours will be from 12:00 noon until 6 P.M.

In addition, borough offices of the Board of Elections will register both permanently registered voters and "parent voters" daily from 9 A.M. to 5 P.M. and on Saturdays from 9 A.M. to noon, through April 26. Another opportunity to register permanent voters will be provided in various community school districts by volunteer groups deputized by the Board of Elections to register voters. The volunteers will serve at any time, day and place approved by the Board of Elections through April 7.

"Parent voter" registration by volunteers from Parents Associations and Parents-Teachers Associations which has been going on in some public elementary, intermediate and junior high schools since "Open School Week" in October, 1974 will continue through April 7, except when schools are closed for Spring recess.

Persons already permanently registered for general elections who wish to vote in the community school district in which they reside are not required to re-register for

Community School Board elections. However, persons not already permanently registered as well as parents who have children attending public elementary, intermediate and junior high schools and who are not qualified for permanent registration, must register to vote in the Community School Board elections. "Parent voters" who registered in the 1973 elections must register again.

Nomination of Candidates

A candidate must file a nominating petition containing no fewer than two hundred valid signatures of voters who will be registered as "parent voters" or as permanently registered voters before the expiration of the period for the filing of petitions on April 7.

Petition forms in English and Spanish may be obtained after February 21 without charge from the borough offices of the Board of Elections. See page 2 for addresses. Signing of petitions will take place from February 27 through April 7.

Qualifications for Candidates

Any eligible "parent voter" or any permanently registered voter may be a candidate. A permanently registered voter may be a candidate for the Community School Board of the school district in which he lives or in which his child attends a public elementary, intermediate or junior high school if he or she registers as a "parent voter" in that district. A "parent voter" may be a candidate for the Board of the district in which his or her child attends a public elementary, intermediate or junior high school.

A person elected to a Communty School Board shall be ineligible to be employed by that Community School Board.

• • •

Special Circular No. 57

Special Circular No. 57, 1974-1974 Page 3

BI-LINGUAL TRANSLATORS

The Board of Elections will assign translators at registration desks during registration days, according to the needs of the schools as indicated by an analysis of their student populations. Translators will also be assigned to polling places on election day, May 6, as needed.

PUBLICITY

A publicity campaign will be conducted through all communications media preceding the March registration and the elections in May.

• • •

Very truly yours,

IRVING ANKER
Chancellor

Affidavit of Judith A. Gordon in Opposition to Motion for Summary Judgment

STATE OF NEW YORK }
COUNTY OF NEW YORK } ss.:

JUDITH A. GORDON, being duly sworn, deposes and says, that she is the Assistant in the office of Louis J. Lefkowitz, Attorney General of the State of New York, assigned to the defense of the action on behalf of defendants above-named.

This affidavit is submitted at the request of the Hon. William C. Conner and constitutes an offer of proof with respect to the witness described below.

If permitted, defendants will call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education.

The Division of School Supervision has the responsibility, *inter alia*, of implementing educational standards established by the Education Law, the Board of Regents and the Commissioner of Education in all the elementary secondary schools in the state which come under the jurisdiction of the State Education Department.

Dr. Terino's educational background is in English and Education including school administration. His professional experience includes numerous supervisory positions with the State Education Department, other than his present position, including Associate Superintendent of Secondary Education, Superintendent of Seccondary Education, Superintendent of English. Dr. Terino has been a teacher, assistant principal and principal in private schools. He has been a teacher in public elementary schools and in secondary academic and vocational schools. He has been a Department Chairman and an Assistant Principal in the public schools.

Dr. Terino will testify that teachers in elementary and secondary public schools are in fact required to impart principles of American citizenship to their students. In so

stating, Dr. Terino will rely not only on his own opinion and experience but will cite relevant authorities including, but not limited to, "Cardinal Principles of Secondary Education," *Report of the Commission on the Reorganization of Secondary Education,* Washington, D.C. 1918.

Dr. Terino will be testify that the function of a teacher in the elementary and secondary schools is not in fact limited to imparting particular subject matter but that the teacher serves as a model and example for his students from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns. In so stating, Dr. Terino will rely not only on his own experience and opinion but will cite relevant authorities in the field of educational psychology.

In conclusion, Dr. Terino will testify that in his opinion (as well as the evident opinion of the New York State Legislature) aliens who voluntarily refuse naturalization and thereby choose to continue their allegiance to another nation and their identification with the political tradition, culture and Nores of the nation are not appropriate teachers in a curriculum that requires imparting principles of American citizenship.

(Sworn to by Judith A. Gordon on April 23, 1976.)

Opinion of the Three-Judge Court

BEFORE:

WILFRED FEINBERG, United States Circuit Judge, Second Circuit

LAWRENCE W. PIERCE, United States District Judge

WILLIAM C. CONNER, United States District Judge

CONNER, D. J.:

This action represents yet another chapter in the expanding volume of cases involving constitutional challenges to State statutes and regulations designed to limit certain types of employment to citizens, thereby excluding, among others, permanent resident aliens.[1] In the present case, plaintiffs[2] contest the validity of Section 3001(3) of the New York Education Law, which provides that no alien may be employed to teach in the public schools of New York State (the public schools), unless and until that alien has made application to become a United States citizen and thereafter proceeds, in due course, to become a citizen.[3]

Plaintiffs, aliens who have elected to retain their native citizenship (non-applicant aliens), have both applied for certification to teach in the public schools. However, because they do not fit within the liimted exceptions to Section 3001(3), plaintiffs have been denied certification.[4] It is undisputed that, in both cases, the denial of certification has borne no relation to plaintiffs' general character or qualifications, but rather, is solely the product of their status as non-applicant aliens.

On June 27, 1974, plaintiff Norwick commenced this action for injunctive and declaratory relief. She asserts, in addition to other claims, a cause of action under the Civil Rights Act of 1871, 42 U.S.C. § 1983, and its jurisdictional counterpart, 28 U.S.C. § 1343. With the consent of defendants,[5] the Court entered orders dated September 9,

1975 and December 18, 1975, convening a three-judge constitutional court pursuant to 28 U.S.C. §§ 2281 and 2284 and granting plaintiff Dachinger's motion to intervene.

Presently before the Court is plaintiff's motion, pursuant to Rule 56 F.R.Civ.P., for a summary judgment declaring Section 3001(3) unconstitutional and enjoining its further enforcement.

I.

It is beyond reasonable dispute that the power of New York, or any other state, to promulgate regulatory legislation such as Section 3001(3) is qualified by various provisions of the United States Constitution. In this case, plaintiffs claim that the ban of Section 3001(3)[e] on certification of non-applicant aliens for teaching positions in the public schools offends the Equal Protection and Due Process Clauses of the fourteenth amendment and the Supremacy Clause of Article VI.

We are not insensible of the Supreme Court's admonition that a three-judge court should consider constitutional challenges to State statutes only if non-constitutional "statutory" Supremacy Clause issues, within the jurisdiction of a single judge, prove not to be dispositive. *Hagans* v. *Lavine,* 415 U.S. 528 (1974). Nonetheless, it should be stressed that *Hagans* has neither expanded nor diminished the basic jurisdictional authority or either single-judge or three-judge district courts. To the contrary, the *Hagans* ruling is addressed to procedure only. Thus, the *Hagans* Court, in the interests of judicial economy and in light of " 'the constrictive view of • • • three-judge [court] jurisdiction which [the Supreme Court] has traditionally taken'," concluded and directed that the single judge should exhaust all potentially dispositive claims within his jurisdiction before resort to a three-judge court. Hence, where constitutional claims over which a three-judge court would have

exclusive jurisdiction coincide with non-constitutional claims reviewable by a single judge, *Hagans* directs the single judge, before convention of a three-judge court, to do no more than the latter would itself be required to do, *i.e.,* to dispose of the litigation on non-constitutional grounds, if possible, pursuant to the well settled rule that "a federal court should not decide federal constitutional questions where a dispositive nonconstitutional ground is available." *Hagans* v. *Lavine, supra,* at 546-47.

Typically, the *Hagans* doctrine has been applied to cases in which specific State statutes or regulations are asserted to be in conflict with specific federal statutory or regulatory provisions, *e.g., Holley* v. *Lavine,* 529 F.2d 1294, 1296 (2d Cir. 1976); *Roe* v. *Norton,* 522 F.2d 928 (2d Cir. 1975); *Roe* v. *Ferguson,* 515 F.2d 279 (6th Cir. 1975); *Brown* v. *Beal,* 404 F.Supp. 770 (E.D.Pa. 1975). In such cases, it is the single judge's office merely to "interpret[] the [applicable] statute and • • • regulation," *Holley* v. *Lavine, supra* at 1296, and to determine whether there is a conflict with federal enactments addressed to the same subject matter. It is axiomatic that, should the reviewing judge identify such a conflict, under the Supremacy Clause the State statute must defer to the federal. It was that type of question, resting upon a statutory comparison, that *Hagans* denominated a "Supremacy Clause ('statutory')" issue. *Hagans* v. *Lavine, supra,* at 545. Although, within such a context, a State statute or regulation may be declared "unconstitutional," *i.e.,* violative of the Supremacy Clause, see, *e.g., DeCanas* v. *Bica,* 44 U.S.L.W. 4235, 4236 (U.S. February 25, 1976), the judge can decide the issue without having to interpret the Constitution.

This is a very different case. Here, despite plaintiffs' sweeping citation to the bulk of the Immigration and Nationality Act, 8 U.S.C. § 1101 et seq., the purported conflict underlying plaintiffs' Supremacy Clause argument is

not between Section 3001(3) and any specific enactment of Congress, but rather, between Section 3001(3) and the exclusive power to regulate immigration and naturalization vested in the federal government by Article 1, Section 8, clause 4 of the United States Constitution. Unlike the clearly "statutory" Supremacy Clause argument in *Hagans,* the Supremacy Clause argument in this case derives exclusively and directly from the Federal Constitution rather than from federal legislation, entails an immediate resort to the Constitution and, if "substantial," see *Goosby* v. *Osser,* 409 U.S. 512, 518 (1973), requires the convention of a three-judge court.

The conclusion that the present Supremacy Clause argument is "constitutional" rather than "statutory" is supported inferentially, by a number of similar cases. Thus, in *Graham* v. *Richardson,* 403 U.S. 365 (1971), the Supreme Court ruled in favor of the alien plaintiffs on *both* equal protection and Supremacy Clause grounds. In *Sugarman* v. *Dougall,* 413 U.S. 634 (1973), the Supreme Court elected to affirm the lower court on equal protection grounds, ignoring the Supremacy Clause argument that had been adopted by the court below. Although these decisions are pre-*Hagans,* they by no means pre-date the doctrine that constitutional rulings are to be avoided whenever possible. More recently, in a post-*Hagans* decision, Judge Gurfein, writing for a three-judge panel in the Eastern District of New York, ruled New York Labor Law Section 222 unconstitutional on both equal protection and Supremacy Clause grounds, *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York,* 75 Civ. 1172 (E.D.N.Y. 1976), without any discussion of *Hagans.*

We therefore believe that the Supremacy Clause claim herein is more properly viewed as a true "constitutional" argument which was thus beyond the convening court's jurisdiction. In any event, the determination whether it is constitutional or statutory is at least sufficiently troublesome that *Hagans'* stated objective of judicial efficiency

would seem better served not by the extensive digression which such determination would require but by proceeding directly to the clearly constitutional equal protection argument which we find dispositive.

For reasons outlined in considerable detail below, this Court concludes that Section 3001(3) violates the Equal Protection Clause of the fourteenth amendment. Thus, plaintiffs' motion for summary judgment must be granted and we need not consider plaintiffs' due process and Supremacy Clause arguments.

II.

At the threshold of any equal protection analysis, a reviewing court must of course identify the standard of judicial scrutiny that is appropriate to the case before it. Under familiar principles, if a regulation impinges upon a "fundamental right," *Shapiro* v. *Thompson,* 394 U.S. 618 (1969), or creates an inherently "suspect classification" such as race, nationality or alienage, the challenged provision will be subjected to "close judicial scrutiny," requiring the State to establish a "compelling interest in its enactment. See, *e.g., Graham* v. *Richardson,* supra, at 372-75 (1971). As the Supreme Court has recently observed, a State that employs

> "a suspect classification, 'bears a heavy burden of justification,' * * *, a burden which, though variously formulated requires [a] State to * * * show that its purpose or interest is both constitutionally permissible and substantial, and that its use of the classification is 'necessary * * * to the accomplishment' of its purpose or the safeguarding of its interest." *In re Griffiths,* 413 U.S. 717, 721-22 (1973) (footnotes omitted).

If, on the other hand, the regulation does not affect a fundamental right or create a suspect classification, it has tra-

ditionally been accorded a presumption of constitutionality that may not be disturbed unless the enactment is shown to rest on grounds "wholly irrelevant to the achievement of [a legitimate] state [] objective." *McGowan* v. *Maryland,* 366 U.S. 420, 425-26 (1961); see also *Williamson* v. *Lee Optical,* 348 U.S. 483 (1955); *Metropolis Theater Co.* v. *City of Chicago,* 228 U.S. 61 (1913).[7]

In an effort to avoid the "heavy burden" imposed upon those seeking to establish a compelling state interest in a particular legislation, defendants refer us to the several Supreme Court decisions that have measured the constitutionality of a number of state statutes against the more lenient "rational relationship" standard. *Schware* v. *Board of Law Examiners of New Mexico,* 353 U.S. 232, 239 (1957); *Williamson* v. *Lee Optical Co.,* 348 U.S. 483, 489 (1955); *Kotch* v. *Board of River Port Pilot Commissioners,* 330 U.S. 552, 556 (1947).[8]

Defendants correctly observe that the cited cases, like that at bar, involve constitutional challenges to State statutes regulating professions or trades invested with a strong public interest. On the basis of that kinship, defendants urge us to adopt here the same standard of review. We cannot do so. The appropriate standard of judicial review is determined, not by the strength of the public interest sought to be protected, but rather by the nature of the right (fundamental or not) being regulated and/or the type of classification (suspect or not) which the regulation creates. Since none of the Supreme Court decisions cited above involved a statute affecting any fundamental right or creating any suspect classification, application of the rational relationship test was there indciated. That is not the situation here.

Ninety years ago, the Supreme Court first ruled that an alien is a "person" entitled to the safeguards afforded by the Due Process and Equal Protection Clauses of the fourteenth amendment. *Yick Wo* v. *Hopkins,* 118 U.S. 356,

369 (1886). See also In re *Griffiths, supra,* at 719-20; *Sugarman* v. *Dougall,* 413 U.S. 634, 641 (1973); *Graham* v. *Richardson, supra,* at 371; *Takahashi* v. *Fish & Game Commission,* 334 U.S. 410, 420 (1948); *Traux* v. *Raich,* 239 U.S. 33, 39 (1915); *Wong Wing* v. *United States,* 123 U.S. 228, 238 (1896). Those safeguards were subsequently ruled to protect aliens seeking employment "in the common occupation of the community,'" *Traux* v. *Raich, supra,* at 41; *Sugarman* v. *Dougall, supra* at 641. Indeed, the power "to apply [State] laws exclusively to • • • alien[s] • • • as a class [has been steadily] confined within narrow limits." *Takahashi* v. *Fish & Game Commission, supra,* at 420. However, the precise standard for judicial review of statutes creating classifications based on alienage remained undefined until this decade. Finally, in the landmark case of *Graham* v. *Richardson, supra,* the Supreme Court, in striking down a State statute denying welfare benefits to resident aliens, ruled that

> "classifications based on alienage • • • are inherently suspect and subject to close judicial scrutiny." *Id.* at 372.

Writing for the Court, Justice Blackmun observed that

> "[a]liens as a class are a prime example of a 'discrete and insular' minority • • • for whom such heightened judicial solicitude is appropriate." *Id.* at 372.

In subsequent decisions, the Supreme Court has applied the rationale of *Graham* to its review of State statutes foreclosing aliens from a variety of public and non-public jobs.

Thus, in *Sugarman* v. *Dougall, supra,* the Supreme Court considered an equal protection challenge to Section 53 of the New York Civil Service Law, which denied aliens the right to hold positions in New York's "competitive civil service." Section 53 did not survive the *Sugarman* Court's

strict scrutiny. Having indicated that Section 53 was both overinclusive and underinclusive, the Court rested its ruling on the statute's fatal imprecision.

Decided the same day as *Sugarman* was *In re Griffiths, supra,* in which the Supreme Court condemned a Connecticut statute that excluded aliens from the practice of law. Earlier this year, Judge Weinfeld, in striking down Section 6524(b) of New York's Education Law,[10] offered the following précis of the *Griffiths* decision:

> "The Court premised its judgment upon basic constitutional concepts: first, that a lawfully admitted resident alien is a 'person' within the Fourteenth Amendment's prohibition against denial 'to any person within its jurisdiction the equal protection of the laws'; second, that the 'right to work for a living in the common occupations of the community is of the very essence of the personal freedom and opportunity that it was the purpose of the [Fourteenth] Amendment to secure'; third, that 'classifications based on alienage, like those based on nationality or race, are inherently suspect and subject to close judicial scrutiny'; fourth, that a state which adopts a suspect classification 'bears a heavy burden of justification'; and fifth, that 'to justify the use of a suspect classification, a State must show that its purpose or interest is both constitutionally permissible and substantial and that its use is "necessary • • • to the accomplishment" of its purpose or the safeguarding of its interest'." *Surmeli* v. *New York,* 412 F.Supp. 394 (S.D.N.Y. 1976) (footnotes omitted).

It is the opinion of this panel that *Graham, Sugarman* and *Griffiths* establish, beyond peradventure, that any challenged State statute or regulation placing aliens, as a class, at a disadvantage vis-à-vis citizens must withstand the rigors of close judicial scrutiny.[11] Thus, the deprivation protested by plaintiffs herein can be justified only if Section 3001(3) is shown to be a *necessary* implement of a *compelling* state interest. We "therefore look to the substantiality of the State's interest in enforcing [Section 3001(3)], and to the narrowness of the limits within which the discrimination is confined." *Sugarman* v. *Dougall, supra,* at 642.

III.

In attempted justification of Section 3001(3), defendants assert that, "Given the vital role of the educational system in the American democracy," the State has a compelling interest in the assurance that those who minister to the educational needs of its young are qualified, both by profession and example, to transmit the American heritage to their students. Thus, defendants argue, in furtherance of this interest,

> "it • • • does not offend the equal protection rights of aliens to require that in order to obtain teaching positions within that system, they act, affirmatively to identify themselves with that democracy. By obtaining declarant status (and timely completing the naturalization process), the alien has provided objective evidence that he in fact believes in the American heritage which he in turn is obliged to transmit to his students."

Defendants urge that the State-required oath of allegiance, in which plaintiffs expressly stand ready to join, is an inadequate badge of identification with the United States.[12] Section 3001(3), defendants conclude, "is certainly an appropriate if not the 'least drastic means' for effectuating" the interest it was enacted to support.

To be sure, a "teacher works in a sensitive area in a schoolroom. There he shapes the attitude of young minds

towards the society in which they live. In this, the State has a vital concern." *Adler* v. *Board of Education,* 342 U.S. 485, 493 (1952). Accordingly, "[t]here can be no doubt of the right of a State to investigate the competence and fitness of those whom it hires to teach in its schools * * *," *Shelton* v. *Tucker,* 364 U.S. 479, 485 (1965) (footnote omitted), and there is "no requirement * * * that a teacher's classroom conduct be the sole basis for determining * * * fitness." *Beilan* v. *Board of Education,* 357 U.S. 399, 406 (1958). Moreover, in a somewhat different context, the Supreme Court has acknowledged that the "State's broad power to define its political community" might include "requir[ing] citizenship" in "an appropriately defined class of positions." *Sugarman* v. *Dougall, supra,* at 642-43, 646-47.

Thus aware that the Supreme Court has recognized a strong nexus between the classroom and the political community and that it has at least intimated its approval of citizenship requirements for jobs bearing a relationship to the State's ability to "define its political community," one might infer that teaching fits within the narrow area of allowable discrimination discussed in Sugarman.[13]

This Court must be no less aware, however, of *Sugarman's* ultimate stricture: when a State seeks to vindicate even a compelling interest, through discrimination, "the means the State employs must be precisely drawn in light of the acknowledged purpose." *Id.* at 653. Even if Section 3001(3) had safely negotiated all of the other shoals, on this rock it clearly founders.

Defendants have attempted to justify the sweeping breath of Section 3001(3) by exhuming an argument laid to rest in *Griffiths* and *Sugarman,* contrasting the undivided allegiance which a citizen presumptively bears to this country with a resident alien's potential conflict of loyalties. On the basis of this supposed conflict, defendants

would have us conclusively presume that all those who elect not to seek U.S. citizenship, regardless of their nation of birth, the academic subject they seek to teach, the nature and strength of their ties to this country or their willingness to pledge allegiance to it, are unqualified for such responsibilities.

The Supreme Court rejected a like "undivided allegiance" argument advanced by the defendants in *Sugarman* because, in that case,

> "the State's broad prohibition of the employment of aliens applies to many positions with respect to which the State's proffered justification has little, if any, relationship. At the same time, the prohibition has no application at all to positions that would seem naturally to fall within the State's asserted purpose.
>
> • • • •
>
> [Section 53's] imposed ineligibility may apply to the 'sanitation man, class B,' Perotta v. Gregory, 4 Misc. 2d 769, 158 N.Y.S. 2d 221 (1957), to the typist, and to the office worker, as well as to the person who directly participates in the formulation and execution of important state policy. The citizenship restriction sweeps indiscriminately." *Id.* at 642-42.

As with the statute challenged in *Sugarman,* Section 3001(3) is damned by its imprecision. It excludes *all* nonapplicant aliens, regardless of nationality, from *all* teaching positions in the public school system, regardless of grade level or subject matter.[14] It thus bars British subjects seeking certification to teach mathematics or physical education as well as Soviet citizens seeking to teach civics or economics. The statute's imprecision becomes even more glaring when one considers that the prohibition does not extend to those who teach the thousands of New York children attending private schools. Indeed, even in the public schools, under an amorphous exception to Section

3001(3), the State would permit a non-applicant alien to obtain certification to teach certain subjects requiring "skills or competencies not readily available among teachers holding citizenship."

In *Griffiths,* the undivided allegiance argument was labeled "unconvincing" and the Supreme Court declared the possibility that some aliens might be unsuited to a particular profession no "justification for a wholesale ban." *Id.* at 725; *cf. Hampton* v. *Mow Sun Wong,* 44 U.S.L.W. 4737, 4745 (U.S. June 1, 1976). The applicability of the reasoning of *Griffiths* to the statute challenged here is apparent from the following quotation from that opinion, substituting appropriate references to the State and profession involved:

> "Although, as we have acknowledged, a State does have a substantial interest in the qualifications of those [certified to teach in the public schools], the arguments advanced by the [defendants] fall short of showing that the classification established by [Section 3001(3)] is necessary to the promoting or safeguarding of this interest. [New York] has wide freedom to gauge on a case-by-case basis the fitness of an applicant to [teach]. * * * [New York] can * * * require appropriate training and familiarity with [the subject matter to be taught]. Apart from such tests of competence, it requires a new [teacher] to take [an oath] to 'support the constitution of the United States, and the constitution of the State of [New York].' [Plaintiffs have] indicated [their] willingness and ability to subscribe to the * * * oath[], and [New York] may quite properly conduct a character investigation to insure in any given case 'that an applicant is not one who 'swears to an oath *pro forma* while declaring or manifesting his disagreement with or indifference to the oath.'' *Bond* v. *Floyd,* 385 U.S. 116, 132.' *Law Students Research Council* v. *Wadmond,* 401 U.S. at 164. Moreover, [teachers] are subject to continuing scrutiny by [their superiors] * * *. In sum, [defendants] simply [have] not established that [the State] must exclude all aliens from the [teaching profession] in order to vindicate its undoubted interest * * *.'' In re *Griffiths, supra,* at 725-26 (footnotes omitted).

The question remains whether, via an evidentiary hearing, the State might establish a necessary connection between. Section 3001(3) and the public interest herein involved. In this context, and at the request of the Court, defendants' counsel has submitted, in affidavit form, an offer of proof requesting an opportunity to call Dr. Anthony E. Terino, Director of the Division of School Supervision of the New York State Department of Education. It is represented that Dr. Terino would testify that 1) teachers are required to convey principles of American citizenship to their students; 2) the function of a teacher is not limited to imparting particular subject matter; the teacher also serves as an example for his students "from which they acquire knowledge and are influenced in the formation of their attitudes and behavior patterns" and 3) aliens who voluntarily refuse naturalization "are not appropriate teachers in curriculum that requires imparting principles of American citizenship."

In our opinion, the further delay that would be occasioned by an evidentiary hearing would be unjustified. It is inconceivable that defendants could establish, on the basis of the proposed testimony of Dr. Terino, that a broad exclusion of *all* non-applicant aliens from *all* teaching positions is necessary to the advancement of New York's claimed interest.

No doubt teachers and their students may engage in exchanges reaching beyond the scope of a particular course of instruction. Nevertheless, defendants' position that, regardless of his other attributes, the non-applicant alien's

voluntary decision to retain his native citizenship necessarily renders him, by example, a negative influence, and thus inherently unqualified to teach, is unsupported by anything in the present record. Nor would such a conclusion be supported by the proposed testimony of Dr. Terino. Indeed, New York's attempt to exclude all non-applicant aliens from its academic community seems repugnant to the very heritage the State is seeking to inculcate. As the Supreme Court recognized, albeit in a somewhat different context, statutes which "cast a pall of orthodoxy over the classroom" are ultimately destructive.

> "The classroom is peculiarly the 'marketplace of ideas.' The Nation's future depends upon leaders trained through wide exposure to that robust exchange of ideas which discovers truth 'out of a multitude of tongues [rather] than through any kind of authoritative selection.'" *Keyishian* v. *Board of Regents*, 385 U.S. 589, 603 (1967). (citations omitted).

We conclude that Section 3001(3) is unconstitutional and that its further enforcement must be enjoined.

Plaintiffs' motion for summary judgment is granted.

Submit order on notice.

Dated: New York, New York, July 20, 1976.

FOOTNOTES

[1] See, *e.g.*, *Sugarman* v. *Dougall*, 413 U.S. 634 (1973); *Foley* v. *Connelie*, 75 Civ. 4548 (S.D.N.Y. July 8, 1976); *Surmeli* v. *New York*, 75 Civ. 4520 (S.D.NY. April 7, 1976); *C.D.R. Enterprises, Ltd.* v. *Board of Education of the City of New York*, 75 Civ. 1172 (E.D.N.Y. March 1976); *Mauclet* v. *Nyquist*, 75 Civ. 73 (E.D.NY. February 11, 1976).

[2] Plaintiff Susan M. W. Norwick was born in Dundee, Scotland and is a British subject. Married to a United States citizen, she is a federally registered resident alien and has resided in this country since 1965. Ms. Nowick is a graduate of North Adams State College in Massachusetts, where she received a B.A. degree *summa cum laude*. She is presently a full-time graduate student in Development Reading at the State University of New York at Albany, where she has compiled a straight A average. Since 1960, Ms. Norwick has been periodically employed as a teacher both in this country and in Great Britain.

Intervenor-plaintiff Tarja U. K. Dachinger was born in Turku, Finland and remains a citizen of that country. Ms. Dachinger majored in German at Lehman College, from which she received a B.A degree *cum laude* and an M.S. degree in Early Childhood Education. She is married to a U.S. citizen and has resided in this country since 1966.

[3] Section 3001(3) provides, *inter alia*:

> "No person shall be employed or authorized to teach in the public schools of this state who is:
>
> • • •
>
> 3. Not a citizen. The provisions of this subdivision shall not apply, however, to an alien [who] make[s] due application to become a citizen and thereafter within the time prescribed by law shall become a citizen.

[4] The only exceptions to Section 3001(3) are contained in Section 3001-a of the New York Code of Rules and Regulations.

New York Education Law § 3001a- provides:

> "A person, not a citizen, who files with the department satisfactory proof that he has filed with the attorney general of the United States a first preference petition pursuant to section two hundred three (a) (1) of the immigration and nationality act [8 U.S.C.A. § 1153(a) (1)] and that said petition has been approved by such attorney general upon certification by the department of justice, immigration and naturalization service, that he is unable to adjust his status to that of

a lawful permanent resident of the United States solely because of an over-subscribed quota to which he is chargeable may receive from the commissioner of education, notwithstanding the provisions of subdivision three of section three thousand one of this chapter, a temporary permit validating his employment in a teaching capacity in the public schools of the state. Such temporary permit shall be valid for one year from the date of issue and may, upon proper application to the commissioner, be once renewed for a further period of one year. Such application shall be in the form required by the commissioner. Such applicant shall not be employed until he shall have taken and subscribed the following oath or affirmation:

'I do solemnly swear (or affirm) that I will support the constitution of the United States of America and the constitution of the State of New York, and that I will faithfully discharge, according to the best of my ability, the duties of the position of . . . (title of position and name or designation of school, college, university or institution to be here inserted), to which I am now assigned.' The affidavit and oath required by this section shall be administered by the superintendent of schools having jurisdiction over the school district in which such person is to be employed or his duly authorized representative and shall be filed with the commissioner of education. Copies thereof shall be filed with the superintendent of schools."

Section 80.2(i) of 8 New York Code of Rules and Regulations provides:

> *"Citizenship.* A teacher who is not a citizen of the United States or who has not declared intention of becoming a citizen may be issued a provisional certificate providing such teacher has the approprite educational qualifications as defined in the regulations and (1) possesses skills or competencies not readily available among teachers holding citizenship, or (2) is unable to declare intention of becoming a citizen for valid statutory reasons.

[5] The individual defendants, public officials serving within the New York State Department of Education, are responsible for the implementation and enforcement of the statutes and reguration challenged herein.

[6] Although the complaints filed in this action refer to "Sections 3001 and 3001-a of the New York Education Law and Section 80.2 of the Regulations of the Commissioner of Education of the State of New York," it is clear that a ruling on the constitutionality of

Section 3001(3) will be dispositive of this entire case. None of the other subdivisions of Section 3001 has been challenged in this action. Sections 3001a- and 80.2(i), which provide limited exceptions to Section 3001(3), are challenged only to the extent that as exceptions to a disallowance they might imply the existence of a disallowance. This Court need only note that, should we find it necessary to invalidate Section 3001(3), Sections 3001-a and 80.2(i) could not conceivably operate to deny plaintiffs the certification they require to teach. Accordingly, we restrict our review to Section 3001(3). See *In re Griffiths*, 413 U.S. 717, 726 n. 17 (1973).

[7] In recent years, the Supreme Court has apparently been less willing to accord even those statutes involving non-fundamental, non-suspect categories the virtually automatic approval that such legislation had historically enjoyed The Court has indicated that a statute creating any classification must at least "be reasonable, not arbitrary, and must rest upon some ground or difference having a *fair and substantial* relation to the object of the legislation, so that all persons similarly circumstanced shall be treated alike." *Reed* v. *Reed*, 404 U.S 71, 76 (1971) (emphasis added).

See generally Gunther, The Supreme Court 1971 Term, Foreword: In Search of Evolving Doctrine of a Changing Court: A Model for a Newer Equal Protection, 86 Harv.L. Rev. 1 (1972); Note, Legislative Purpose, Rationality and Equal Protection, 82 Yale L.J. 123 (1972) See also *Massachusetts Bd of Retirement* v. *Murgia*, 44 U.S.L.W. 5077, 5081 (U.S. June 25, 1976) (Marshall, J., dissenting).

[8] Defendants also direct the Court to *Law Students Research Council* v. *Wadmond*, 401 U.S. 154 (1971) and *United Public Workers of America* v. *Mitchell*, 330 U.S. 75 (1947). In *Wadmond*, the Supreme Court considered a challenge, on first amendment vagueness and overbreadth grounds, to New York's system for screening applicants for admission to the Bar. *United Public Workers* involved a first amendment challenge to the so-called "Hatch Act," which statute prohibited federal employees from taking "any active part in political management or in political campaigns." Suffice it to say that we have read both cases and are at a loss to determine their relevance to our present inquiry.

[9] To the extent that defendants would invoke the authority of *Heim* v. *McCall*, 239 U.S. 175 (1915), and *Crane* v. *New York*, 239 U.S. 195 (1915), this Court need only note that—whatever the constitutional status of public employment in 1915—more recent decisions make it clear that the States owe all of their lawful residents, whether aliens or citizens, equal access to public as well as private employment, absent the necessity for restrictions

designed to promote compelling state interests. *Sugarman* v. *Dougall*, 413 U.S. 634, 643-45 (1973); *Graham* v. *Richardson*, 403 U.S. 365, 370-75 (1971). See *Examining Bd. of Engineers, Architects and Surveyors* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 49 L.Ed. 2d 65 (1976).

[10] Section 6524(b) required citizenship, or the declared intention to become a citizen, as a condition of retaining a license to practice medicine.

[11] On June 17, 1976, the Supreme Court, reconfirming the standards established by *Graham*, *Sugarman* and *Griffiths*, struck down a Puerto Rico statute that prohibited aliens from engaging in the private practice of engineering. *Examining Board of Engineers, Architects and Surveyors* v. *Flores de Otero*, —— U.S. ——, 96 S. Ct. 2264, 49 L.Ed. 2d 65 (1976).

It is also noteworthy that Justice Rehnquist, though critical of the rule, recognized in his dissent in *Sugarman* that

> "[t]he Court in [*Sugarman* and *Griffiths*] holds that an alien is not really different from a citizen, and that any legislative classificaiton on the basis of alienage is 'inherently suspect'." *Id.* at 649.

[12] In *In re Griffiths*, 413 U.S. 717 (1973), the Supreme Court noted:

> "We find no merit in the contention that only citizens can in good conscience take an oath to support the Constitution. We note that all persons inducted into the Armed Services, including resident aliens, are required by 10 U.S.C. § 502 to take the following oath:
>
> 'I, ..., do solemnly swear (or affirm) that I will support and defend the Constitution of the United States against all enemies, foreign and domestic; that I will bear true faith and allegiance to the same; and that I will obey the orders of the President of the United States and the orders of the officers appointed over me, according to regulations and the Uniform Code of Military Justice. So help me God.
>
> If aliens can take this oath when the Nation is making use of their services in the national defense, resident alien applicants for admission to the bar surely cannot be precluded, as a class, from taking an oath to support the Constitution on the theory that they are unable to take the oath in good faith." *Id.* at 726 n.18.

[13] On the same day that it decided *Sugarman* v. *Dougall*, *supra*, and *In re Griffiths*, *supra*, the Supreme Court summarily affirmed a District of Arizona decision that had invalidated, on equal

protection grounds, a State statutory and constitutional scheme excluding aliens from a broad range of public jobs, numbered among which was teaching. *Miranda* v. *Nelson*, 351 F.Supp. 735 (1973), *aff'd*, 413 U.S. 902 (1973). Whatever the weight of precedential authority accorded summary affirmances of the Supreme Court, see *Hicks* v. *Miranda*, 422 U.S. 332, 343-46 (1975); *Fusari* v. *Steinberg*, 419 U.S. 379, 391-92 (1975) (Burger, C.J., concurring); *Edelman* v. *Jordan*, 415 U.S. 651, 671 (1974); *Doe* v. *Hodgson*, 478 F.2d 537, 539 (2d Cir.), *cert. denied sub nom. Doe* v. *Brennan*, 414 U.S. 1096 (1973); Note, Aliens' Right to Teach; Political Socialization and the Public Schools, 85 Yale L.J. 90, 99 n.45 (1975), *Miranda's* relevance to this case should not be overestimated.

Although one of the named plaintiffs in *Miranda* was a teacher, the case involved, as noted above, a broad-based challenge to an Arizona policy that precluded aliens from public employment in general. The *Miranda* defendants' arguments, as well as the court's analysis, centered upon the "special public interest" doctrine. The opinion affirmed by the Supreme Court did not focus upon—or, indeed, allude to—the State's peculiar and particular interests in regulating the teaching profession. Thus, the Supreme Court's summary affirmance in *Miranda* would provide an unsteady foundation upon which to rest a decision in the present case.

[14] Defendants have taken pains to depict Section 3001(3) as a carefully circumscribed legislative effort to promote continued patriotism among our citizenry. They have chosen to ignore the fact that Section 3001(3) is but one aspect of a rather comprehensive statutory scheme, embodied in the Education Law, prohibiting the alien from participation in a broad range of employments—including that of physician (§ 6524), physical therapist (§ 6534), chiropractor (§ 6554), dentist (§ 6604), veterinarian (§ 6704), pharmacist (§ 6805), professional engineer (§ 7206), landscape architect (§ 7324), shorthand reporter (§ 7504), and masseur (§ 7804). The Education Law, however, specifically provides that citizenship is not a qualificaion for licensure in the following professions; professional and practical nursing (§ 6904 and 6905), podiatry (§ 7004), optomery (§ 7104), ophthalmic dispensing (§ 7124), architecture (§ 7304), certified public accountancy (§ 7404, psychology (§ 7603) and social work (§ 7704).

Order and Judgment

Based upon the opinion of this Court dated July 20, 1976, and all prior proceedings, it is ORDERED, ADJUDGED AND DECREED;

1. Section 3001(3) of the New York Education Law is hereby declared unconstitutional as a violation of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution;

2. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana, their agents, successors and employees, and all persons having actual notice of this order, are hereby permanently enjoined and restrained from enforcing § 3001(3) of the New York Education Law;

• • •

4. Defendants Ewald Nyquist, Vincent Gazzetta and Thomas Milana are hereby ordered to pay to plaintiffs their reasonable costs to be taxed expended in this action.

Dated: New York, New York
Aug. 23, 1976

/s/ WILFRED FEINBERG
Wilfred Feinberg
United States Circuit Judge

/s/ LAWRENCE W. PIERCE
Lawrence W. Pierce
United States District Judge

/s/ WILLIAM C. CONNER
William C. Conner
United States District Judge

Judgment entered
8/25/76
/s/ Raymond F. Burghardt
Clerk

Notice of Appeal

SIRS:

PLEASE TAKE NOTICE that the defendants Ewald Nyquist, individually and as Commissioner of the New York State Education Department, Vincent Gazzetta, individually and as Director of the Division of Teacher Certification of the New York State Education Department, and Thomas Malina, individually and as Acting Director of the Division of Professional Conduct of the New York State Education Department, and their successors in office, hereby appeal to the Supreme Court of the United States from the Order and Judgment of the three judge district court, entered on August 25, 1976, declaring New York Education Law § 3001(3) unconstitutional under the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution and permanently enjoining its enforcement and from each and every part of that Order and Judgment.

This appeal is taken pursuant to 28 U.S.C. § 1253.

Dated: New York, New York
October 13, 1976

Yours, etc.,

LOUIS J. LEFKOWITZ
Attorney General of the
State of New York

By /s/ JUDITH A. GORDON
Judith A. Gordon
Assistant Attorney General
Attorney for Defendants

To: BRUCE J. ENNIS, Esq.
Attorney for Plaintiffs

(Filed October 13, 1976.)